

September 24, 2018

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation**  
**CG Docket Nos. 02-278, 18-152**

Dear Ms. Dortch:

On September 20, 2018, Mark W. Brennan of Hogan Lovells US LLP, counsel to the American Association of Healthcare Administrative Management (“AAHAM”); Paul Miller of Miller/Wenhold Capitol Strategies, LLC, representative for AAHAM; Mike Merola and Michael McMenamin of Winning Strategies Washington; Adam Goldberg of Anthem, Inc.; Catherine Hansen Nabavi of Blue Cross Blue Shield Association, and Vincent Frakes of WellCare Health Plans, Inc. (by telephone) met with Zenji Nakazawa, Public Safety and Consumer Protection Advisor to Chairman Ajit Pai.

During this meeting, we reiterated our request for the Commission to expeditiously grant the Joint Petition,<sup>1</sup> which seeks two clarifications regarding healthcare-related communications under the Telephone Consumer Protection Act (“TCPA”) and the FCC’s *2015 Omnibus TCPA Order*.<sup>2</sup>

1. That the provision of a phone number to a “covered entity” or “business associate” (as those terms are defined under Health Insurance Portability and Accountability Act of 1996 (“HIPAA”)) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations.
2. That the prior express consent clarification in paragraph 141 and the non-telemarketing health care message exemption granted in paragraph 147, both in the *2015 Omnibus TCPA Order*, be clarified to include HIPAA “covered entities” and “business associates.” Specifically, each use of the term “healthcare provider” in paragraphs 141 and 147 of the *2015 Omnibus TCPA Order* should be clarified to encompass “HIPAA covered entities and business associates.”

<sup>1</sup> See Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) (“Joint Petition”).

<sup>2</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 Omnibus TCPA Order*”), *rev’d in part by ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

We also discussed the substance of our recent letters to Representatives Blackburn and Doyle<sup>3</sup> and Senators Thune and Nelson,<sup>4</sup> and as well as our comments to the Commission in June 2018 in response to the *ACA International* decision.<sup>5</sup> As these submissions explain, there is no longer any reason for the Commission to delay grant of the Joint Petition now that the U.S. Court of Appeals for the District of Columbia Circuit has issued a decision regarding the *2015 Omnibus TCPA Order*. The D.C. Circuit's *ACA International* decision confirms that the FCC has broad authority to harmonize the TCPA and HIPAA.<sup>6</sup> And because the Joint Petition raises discrete issues from the FCC's ongoing proceedings on the treatment of automated telephone dialing systems ("ATDS"), reassigned numbers, or revocation of consent, the Commission can grant the Joint Petition without affecting other TCPA decisions.

It has been two years since we filed the Joint Petition and five months since the D.C. Circuit released *ACA International*. Given the voluminous evidence on the record in support of the Joint Petition, including bipartisan endorsements from members of the House<sup>7</sup> and Senate,<sup>8</sup> the Commission should grant the Petition promptly to facilitate time-sensitive health care communications that patients want and need.

Indeed, following the recent FCC oversight hearing in July 2018, Rep. Bilirakis submitted a question for the record asking the Commission to "provide an update regarding the Commission's view on protecting non-telemarketing calls allowed under HIPAA in light of their unique value to and acceptance by consumers and to do so in an expedited manner via delegated authority by the Bureau of Consumer and Government Affairs or by swift Commission action so that beneficiaries' access to health care is not jeopardized, rather than waiting for a

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<sup>3</sup> See Letter from Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management to Reps. Marsha Blackburn and Mike Doyle, Communications and Technology Subcommittee (July 25, 2018) (attached hereto as Exhibit A).

<sup>4</sup> See Letter from Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management to Sens. John Thune and Bill Nelson, Commerce, Science, and Transportation Committee (Aug. 15, 2018) (attached hereto as Exhibit B).

<sup>5</sup> See Comments of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management, CG Docket Nos. 18-152, 02-278 (filed June 13, 2018); see also Comments of American Association of Healthcare Administrative Management, CG Docket Nos. 17-59, 02-278 (filed July 20, 2018).

<sup>6</sup> See *ACA Int'l*, 885 F.3d at 695.

<sup>7</sup> See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017) (asking Chairman Pai to act promptly to "afford clarity to covered entities and business associates making non-marketing communications that benefit patients" and observing that "helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.").

<sup>8</sup> See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017) (noting that the calls and text messages subject to the Joint Petition convey "important medical and treatment information" and "improve patient outcomes" and stating that "time is of the essence to ensure that consumers' access to health care is not jeopardized" and asked the FCC to "resolve these issues as soon as possible (preferably within the next 90 days) and to protect communications allowed under HIPAA in light of their unique value to consumers and their positive impact on Americans' health and well-being.").

larger ‘omnibus’ TCPA ruling that could take much longer.”<sup>9</sup> Rep. Bilirakis’s question yet again underscores the importance of promptly granting the Joint Petition and removing the uncertainty created by the *2015 Omnibus TCPA Order* that has chilled healthcare-related communications.

The breadth and depth of support for the Joint Petition is hardly surprising. The communications at stake include, for example, onboarding, wellness, informational, and follow-up and calls and texts that:

- Explain coverage and how to get needed care;
- Perform health screenings and identify at-risk members;
- Answer questions and ensure that members have access to care;
- Facilitate selection of primary care provider and schedule appointments;
- Remind members to get preventive care, such as shots and vaccines;
- Provide support throughout a patient’s pregnancy;
- Manage chronic conditions and enroll members in care/disease management programs;
- Educate members about proper emergency room utilization;
- Notify patients of changes in enrollment, disruptions in service or coverage, or other events due to non-payment;
- Facilitate transitions of care;
- Help ensure that members are filling and taking medications appropriately;
- Provide post-discharge follow-up instructions;
- Facilitate treatment adherence;
- Solicit member feedback on healthcare quality and other issues and ensure satisfaction;
- Obtain new contact information;
- Update members about benefits and/or network changes;
- Share details about plan features and programs; and
- Remind members about renewing their benefits.

Patients need and expect these and other non-marketing treatment, payment, and operations calls and texts, irrespective of which party in the HIPAA ecosystem—physicians, health plans, clearinghouses, or business associates—places the communication or initially obtains the patient’s telephone number.

Acting quickly to grant the Joint Petition would promote a critical public policy goal of providing effective and efficient medical care, especially to at-risk populations, and it would support the Commission’s longstanding policy of harmonizing HIPAA and the TCPA.<sup>10</sup>

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<sup>9</sup> See Question for the Record from Rep. Gus Bilirakis to the Federal Communications Commission (July 25, 2018) (attached hereto as Exhibit C).

<sup>10</sup> See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1831 ¶ 187 (2012).

Pursuant to Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions about this filing.

Respectfully submitted,

/s/ Mark W. Brennan

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